No. 6125

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

C. I. T. Corporation, a corporation, *Appellant,* vs. United States of America, *Appellee.*	}

BRIEF OF APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

Geo. J. Hatfield,
United States Attorney,

Albert E. Sheets,
Asst. United States Attorney,

Attorneys for Appellee.

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C. I. T. CORPORATION, a corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Brief of Appellee

JURISDICTION

This case comes here on appeal from order of forfeiture of one Graham Truck, the subject of the property in controversy in the libel proceedings, made by his Honor Judge A. F. St. Sure at Sacramento on February 14, 1930.

ISSUES

(a) *Libel of Information.* The libel filed by the United States Attorney for the Northern District of California alleges in substance that on the 17th day of March, 1928, in Yolo County, a Prohibition Agent seized the Graham Truck in question at the time in a

yard and enclosure known as the McGregory Ranch, wherein was also found one 350 gallon alcohol still complete, 10,000 gallons of mash, 150 gallons of jackass brandy, and 36 sacks of corn sugar; that such articles and raw material were possessed with the intent to manufacture intoxicating liquor of a kind subject to tax, and upon which there was then due certain taxes which had not been paid, and such articles and raw material were possessed and concealed with intent to defraud the United States of those taxes, and that such possession and concealment was a violation of the provisions of Section 3450 of the Revised Statutes, and concluded with the usual prayer for condemnation, etc.

(b) *Demurrer and Answer.* The C. I. T. Corporation (plaintiff in error) appeared as claimant and filed its demurrer and answer setting forth in substance that it was a Delaware corporation doing business in California, and lacking sufficient knowledge or information generally and specifically denied all of the allegations of the libel, and further affirmatively alleged that it was the owner of and entitled to the possession of the truck, and that if such articles and raw material were in the truck at the time of its seizure they had been placed there without the connivance or knowledge of the claimant, concluding with the usual prayer for immediate possession.

QUESTIONS PRESENTED

The specifications of error, twelve in number, have been narrowed and consolidated into six, and are:

1. The Court erred in overruling the demurrer and in treating "Section 3450" as surplusage, even though

all of the allegations of the libel showed it clearly to have been well drawn under Section 3453, R. S.

(Assignment of Error No. 1, R. 19)

2. That the Court erred in overruling the demurrer since the libel failed to allege in substance that the still, mash, corn sugar and jackass brandy found in the yard with the truck "were to be there manufactured into contraband."

(Assignment of Error No. 6, R. 21)

3. That the Court erred in rendering judgment of forfeiture without having made any findings of fact.

(Assignment of Error No. 3, R. 20)

4. That the Court erred in adjudging a forfeiture of the truck, since the person who made the seizure was a Prohibition Agent and not a "Collector or Deputy Collector" or one who had been specially authorized by the Collector of Internal Revenue to make seizure.

(Assignment of Error No. 9, R. 22)

5. The Court erred in adjudging a forfeiture because there was no evidence of an intent to defraud the United States.

(Assignment of Error No. 12, R. 23)

6. The Court erred in adjudging a forfeiture of the truck because the evidence showed that only a part of the truck was within the enclosure.

(Assignment of Error No. 4, R. 20)

STATEMENT OF THE CASE

Since the entire evidence and the facts are all contained in the brief story of one witness, and a stipulation, they may be adopted as a summary of the facts and are as follows:

Joseph R. Sheean, for the United States, testified as follows:

> "I am, and on March 17, 1928, was a Federal Prohibition Officer. On that date I had occasion to visit premises in Yolo County on which was located a still. At the Miagregoria ranch, four miles south of Westgate, in Yolo County, I found a 150-gallon alcohol plant complete, with 1000 gallons of mash complete and 150 gallons of jackass brandy, and such other supplies for a still. The still was enclosed within a large barn. Found the truck in the premises outside of the barn—about 50 yards. Around the barnyard was a one by six board fence. They had opened the gate and they started in the enclosure—the agents started to apprehend, but one got away and he apprehended the other—the front wheels (of the truck) were in the yard and the hind wheels just going across the line and when the agents came out of the barn the men attempted to get away and one did get away.
>
> "On the truck was some Argo sugar—that is used for the distillation of spirits—I found similar sugar at the still. It is my belief that no tax had been paid.
>
> "The truck was not moving when I first saw it. I was on the premises—it came on the premises afterwards. We waited for it, on information from one of the men in the still-room that the truck would arrive around midnight. The truck was partly in the enclosure when they tried to get away. The gate had been opened—I wasn't at the gate. I would say the truck was just about on the line—it was part over the line, and the rear part

outside of this particular enclosure. The gate had been opened and they were proceeding in.

"I found attendants on the place—Frank Poncini and Segundo Romini.

"Frank Poncini, Segundo Romini, Jim Gustalli and Pete Spinoglio were afterwards prosecuted in the State courts and each was fined One Thousand Dollars."

And plaintiff rested.

After which the following stipulation was entered into:

"The automobile in question in this libel was at the time of its seizure and now is owned by the claimant here, C. I. T. Corporation, but had been by said owner delivered into the possession of one Louis Belli under and according to the terms of a conditional bill of sale wherein said C. I. T. Corporation has the title so reserved to claimant until the purchase price of $1628 should have been fully paid. Such purchase price has not been fully paid, in whole or at any time since the seizure herein, and the amount now due and unpaid thereon is the sum of $825. And that

"The C. I. T. Corporation claimant in this suit did not have any knowledge as to the purpose for which this truck was being used or put, and that if the president of the claimant corporation were present he would testify—

"That before the purchase of said contract claimant herein investigated the standing of the said L. Belli as to his financial ability to carry out the terms of the afore-mentioned contract and as to whether or not the said L. Belli was a good moral risk. This investigation was conducted partly by claimant and partly by Messrs. Hooper and Holmes, an investigating agency of San Francisco, California. Inquiry was made of the Sacramento banks as to the financial status of the said L. Belli and the reports therefrom were satisfactory. It was ascertained that the said L. Belli had pur-

chased other automotive equipment and had satisfactorily completed his contracts for the purchase thereof. Inquiries were made from neighbors living in close proximity to the said L. Belli and the reports emanating therefrom were good. After said investigations and reports were obtained claimant herein determined that the said L. Belli was a good moral and financial risk."

And Claimant rested.

STATUTES INVOLVED.

United States Revised Statutes, 3453 (U. S. C., Title 26, Section 1185), provides—

> All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the district court of the United States for the district where such seizure is made.

Other statutes bearing on the question presented will be referred to in the argument.

I. THE COURT ERRED IN OVERRULING THE DEMURRER AND IN TREATING "SECTION 3450" AS SURPLUSAGE, EVEN THOUGH ALL OF THE ALLEGATIONS OF THE LIBEL SHOWED IT CLEARLY TO HAVE BEEN DRAWN UNDER SECTION 3453, R. S.

The information in libel stated in all things a right of forfeiture under Sec. 3453, U. S. R. S. Very properly the Court disregarded as surplusage "3450" which alone could not add to a defective information or vitiate a good one. Pleading by information under this section is sufficient if generally it follow the language of the statute.

U. S. v. Seventeen Empty Barrels, Fed. Cas. No. 16255.

The technical precision of an indictment is not required.

U. S. v. 396 Barrels, Fed. Cas. No. 16,503.

But, even if it were an indictment the Court would disregard the enumeration of the statute for the actual language employed.

Addy vs. U. S., 263 F. 449, p. 451.

This specification is without foundation, and appears to be practically abandoned.

II. THAT THE COURT ERRED IN OVERRULING THE DEMURRER SINCE THE LIBEL FAILED TO ALLEGE IN SUBSTANCE THAT THE STILL, MASH, CORN SUGAR AND JACKASS BRANDY FOUND IN THE YARD WITH THE TRUCK "WERE TO BE THERE MANUFACTURED INTO CONTRABAND."

In support of this specification it is argued that the information of libel should have but did not allege that the truck was found with implements and other personal property "where they were intended to be used" to manufacture the contraband. Such an argument is

untenable, since the information of libel does allege that the Prohibition Agent seized * * * "one Graham Truck * * * which was then * * * in the yard and enclosure of * * * the McGregory Ranch * * * in which said yard and enclosure there was also found * * * one 350 gallon still complete, 10,000 gallons of mash, 150 gallons of jackass brandy and 36 sacks of corn sugar." From such language the clear and only inference to be drawn is that a complete distillery was present and in successful operation, with reserve supplies of raw material. If one came upon such a scene as is thus described in the information the first and only conclusion which could be drawn would be that the property was intended to be used to "manufacture contraband liquor." Certainly it is a standardized presumption that that which has been used as a distillery was in fact "intended to be used" as such. The only suggested authority that the indictment should have but did not allege that the truck and other personal property was in the yard *"where they were intended to be used,"* cited by plaintiff in error is *United States v. 16 Hogshead,* Fed. Cases 16,302. The other two cases cited do not even touch upon this question. But neither is that case authority for the proposition for which it is cited. The Court in the *16 Hogshead case,* relied upon, does not stress the purpose for which the property was intended to be used, but rather it stresses the necessity of an allegation that the property "should have been found on the premises of the manufactory." Here is a full quotation from that authority upon this point:

"But the fifth article, in relation to the tools, implements, etc., is clearly defective, in not alleging they were found in the place or building, or within the yard or inclosure where they were intended to be fraudulently used. The object of this provision obviously was to prevent the future use of the tools and implements for a fraudulent purpose. *And the statute makes it material, as a ground of forfeiture, that they should be found on or about the manufactory in reference to which the charges of fraud are made.* * * * *It is a just and reasonable requirement of the statute that to subject them to forfeiture the property should have been found on the premises of the manufactory.* And if this, under the statute, is a necessary basis of forfeiture, it must be set forth in the information."

U. S. v. 16 Hogshead, Fed. Cases No. 16,302.

Neither the authority cited in behalf of this specification of error, nor the language of the information of libel, gives it support. This information of libel is verbatim with many of those which have come uncriticized to the attention of this Court in the past four years, and identical with the information of libel in *Pacific Finance Corporation vs. United States* (9th), 39 Fed. (2d) 427, upon which a similar decree of forfeiture was sustained.

III. THAT THE COURT ERRED IN RENDERING JUDGMENT OF FORFEITURE WITHOUT HAVING MADE ANY FINDINGS OF FACT.

It is argued by plaintiff in error, "in the case at bar we have a judgment in a civil action at law (tried by the Court) unsupported by *any* finding of fact—either general or special; and therefore it must be that the judgment cannot stand", and then concludes "this

Court then will review the evidence for the purpose of determining its sufficiency."

(a) Special findings were requested by plaintiff in error and refused. This *Rule 42* of the *Rules of Practice* United States District Court, Northern District of California, authorizes:

> "In actions at law in which a jury has been waived by written stipulation filed by the parties, *it shall be in the discretion of the Court to make special findings of fact upon the issues raised by the pleadings. Where such request is made and granted,* no judgment shall be entered until the findings shall have been signed and filed or waived as hereinafter provided."

After properly refusing special findings the Court then made its own finding which was general, to-wit: the order of forfeiture (R. 10). It can be unquestioned that general findings may constitute only a decision of the case.

Aetna Life Ins. Co. v. Board of County Commissioners (8th), 79 Fed. 575, p. 576, was a case tried before the Court without a jury upon an agreed statement of facts. In supporting the general findings of the District Court in that opinion it is stated:

> "It rested in the discretion of the court to make a general finding, instead of special findings. The finding might be as general as the verdict of a jury, and have the same effect."

As a matter of actual practice in libel cases of this nature the usual method is to deny the request for special findings and enter the order of forfeiture or of dismissal, in which latter event the order constitutes the general finding.

(b) Failure of plaintiff in error to move for judgment on the ground of insufficiency of evidence prevents its review by the Appellate Court.

The record discloses that whatever requests for findings plaintiff in error may have made at no time were they coupled with alternative request for judgment. It is too well settled to require more than citation of authorities that the failure to so move for judgment prevents any review of the evidence on appeal. *O'Brien's Manual of Federal Appellate Procedure,* page 5, paragraph 4 states:

> "If a request is made for special findings, *coupled with alternative request for judgment,* and special findings are not made by the court and exception is taken either to the refusal to give special findings requested, if any are made, or to the refusal to find generally by directing judgment, then the question of the sufficiency of evidence is properly saved for review in the appellate court."

Plaintiff in error made its request for special findings but failed to move for judgment, and as a result is barred from a consideration of the sufficiency of the evidence.

Feather River Lumber Co. v. United States, 30 Fed. (2d) 642, was a case in which at the close of the trial (without a jury) the plaintiff in error asked for special findings but failed to move for judgment. The Court said:

> "The defendant assigns as error the denial of its motion for dismissal and non-suit at the close of the government's case, made on the ground that the evidence adduced was insufficient to sustain a finding in favor of the plaintiff. The denial of that motion cannot avail the defendant as ground

for reversing the judgment. After it was denied the defendant proceeded to introduce its testimony, and at the close of the trial it made no motion for judgment on the ground of the insufficiency of the evidence to sustain the complaint. The rule that under the circumstances here presented the evidence cannot be reviewed by an appellate court has been so frequently applied by this and other courts as to render unnecessary a review of the authorities."

Deupree v. United States, 2 Fed. (2d), 44, 45;
Clark v. United States, 245 Fed. 112;
Fleischmann Co. v. United States, 270 U .S. 349.

It will thus be seen that not only is this specification of error without foundation, but that a failure on the part of the plaintiff in error to protect is record by the appropriate motion for judgment has eliminated any consideration on this appeal of the sufficiency of the evidence. This specification would seem further to lack point since all of the evidence is either undisputed or stipulated to. But certainly, looked at from any point of view, the specification is without merit.

IV. THAT THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK, SINCE THE PERSON WHO MADE THE SEIZURE WAS A PROHIBITION AGENT AND NOT A "COLLECTOR OR DEPUTY COLLECTOR" OR ONE WHO HAD BEEN SPECIALLY AUTHORIZED BY THE COLLECTOR OF INTERNAL REVENUE TO MAKE THE SEIZURE.

At page 16 of the brief of plaintiff in error it is admitted:

"It will doubtless be contended *that other decisions* are to the effect that "anybody" can make a seizure, and that the government adopts the seizure by seeking enforcement of the forfeiture."

Not only several, but each case which deals with the

subject so holds, from the very earliest (*Hoyt v. Gelston,* 3 Wheat., 247,310)) to the very last (*United States v. One Ford Coupe,* 272 U. S. 321 at p. 325). Claimant then proceeds to review that unbroken line of authorities upon this subject, and to dispute each judicial utterance upon the point in controversy. Justifiedly it is stated there is no single case which holds in conformity with the claimant's contention. Its brief does not attempt to cite any authority so holding, and the only support for its contention is the argument of counsel. That argument in substance is that, though the unbroken line of authority is against the claimant, each one of those decisions relates to a forfeiture in a case where the statute did not specifically designate the seizing officers as does Section 3453, U. S. R. S., and for that reason Sec. 3453 U. S. R. S. does not come within their purview. A consideration of one, or at most three cases, will dismantle claimant's argument.

United States v. One Ford Coupe, 272 U. S. 321 at p. 325, was a libel against a Ford Coupe brought under Section 3450, which had been seized by the Prohibition Director (instead of, as it was contended it should have been, by an Internal Revenue officer). This decision is dealing primarily with Section 3450, U. S. R. S., which does not designate specifically the officer who must make the seizure. But when Justice Brandeis disposed of the contention urged by claimant that the seizure was made by an unauthorized person he does not limit the rule to a statute such as 3450 U. S. R. S., but on the contrary expressly goes out of his way to take in every Federal statute upon the subject of for-

feitures. Observe his language:

> "The sole question for decision is, whether an automobile, which was seized by a prohibition agent, may be forfeited under Sec. 3450 if it was being used for the purpose of depositing or concealing tax-unpaid illicit liquors with the intent to defraud the United States of the taxes imposed thereon. Obviously, the mere fact that the seizure of the automobile had been made by the prohibition director (instead of by an internal revenue officer) does not preclude the possibility of a proceeding to forfeit under Sec. 3450. *It is settled that where property declared by a federal statute to be forfeited because used in violation of federal law is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized.*" (Italics ours)
>
> *The Caledonian,* 4 Wheat. 100, 101;
> *Taylor v. United States,* 3 How. 197, 205;
> *United States v. One Studebaker Seven-Passenger Sedan,* 4 F. (2d) 534.

Very obviously when Justice Brandeis was writing this opinion he had in mind that section of the Internal Revenue Laws three sections following the one under discussion (Sec. 3453, U. S. R. S., under which this libel is brought), and advisedly stated the all inclusive right of forfeiture in the Government for any seizure of property used in violation of the federal law, no matter how lacking the authority of the person so making the seizure.

It is interesting to note that in support of this doctrine Justice Brandeis considered the Ninth Circuit to be in full accord with the principle which he stated, for in support of it he cites with approval *United States v. One Studebaker Sedan,* 4 Fed. (2d) 534.

United States v. One Studebaker Sedan (9th), 4 Fed. (2d) 534, was a case in which police officers of Seattle seized the car in question which the United States libeled, and it was contended that such seizure was void. In this case the Ninth Circuit considers the line of cases discussed in claimant's brief, and adopting the language of *Taylor v. United States,* 3 How. 197, holds the seizure valid with the following language:

> "But the objection itself has no just foundation in law. At the common law any person may, at his peril, seize for a forfeiture to the government, and, if the government adopts his seizure, and institutes proceedings to enforce the forfeiture, and the property is condemned, he will be completely justified. So that it is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized by this court in Hoyt v. Gelston, 3 Wheat. 247, 310, and in Wood v. United States, 16 Peters, 342, 358, 359. And from these decisions we feel not the slightest inclination to depart."

United States v. One Ox-5 American Eagle Airplane (9th), 38 Fed. (2d) 106, was a case in which the United States sought forfeiture of the Airplane in question for a violation of the Customs Laws. The Airplane had been seized by two Deputy Sheriffs in the State of Washington, and upon their seizure, adopted by the Government, the libel was filed. Claimant excepted thereto among other grounds that the seizure was illegal in that it was not made by duly authorized officers of the United States Customs. The opinion discusses generally all of the statutes of the United States

under which forfeitures may be made, and cites with approval and quotes that portion of the *United States v. One Studebaker Sedan* (supra) in which it is stated that if the government adopts the seizure it "is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause."

Unquestionably the rule has always been, and is today, that the adoption by the Government of a seizure under the Internal Revenue Laws cures any defect in the competency of the person who made the seizure.

The only authority for a contrary statement in application to the present libel is the suggested argument of claimant's counsel. But no case supports the contention.

V. THE COURT ERRED IN ADJUDGING A FORFEITURE BECAUSE THERE WAS NO EVIDENCE OF AN INTENT TO DEFRAUD THE UNITED STATES.

Page 12 of the Apostles shows that Prohibition Agents entered the McGregory Ranch and discovered a huge still and the large quantity of spirituous liquors and raw materials for the manufacture thereof all contained in a secreted place, to-wit: an old barn; that one of the individuals driving the truck containing raw materials similar to that at the still made his escape when approached by the Agents; that the location of the still was unknown to the Government, and that no tax had been paid. Under such circumstances there

must, of course, be a standardized inference that such a still is illicit and that it is being maintained and secreted with intent to defraud the Government of the tax. *Pacific Finance Corporation v. United States,* 39 Fed. (2d) 427, is a case precisely in point and identical information of libel was the pleading used in that case. In concluding that the only inference to be drawn from such facts was that the still was being operated in violation of the Prohibition Law and with intent to avoid the payment of the tax, this Court stated:

> "From the facts stipulated, the trial court was justified in drawing the inference that the distillery was being used in fraud of internal revenue laws and with design to avoid the payment of taxes within the meaning of section 3453. According to the stipulation, there was a distillery in active operation, with a 40 horse power steam boiler with 120 pounds' steam pressure, reasonably requiring supervision, but with no one visible in charge of the premises or of the operations. The only person appearing at the premises was the truck driver with a companion truck to the one already on the premises, which was purchased at the same time, by the same individual, upon the same terms, which truck, as the one already there, was loaded with 5-gallon cans. This truck driver promptly escaped from the premises without unloading, and abandoned the truck upon the highway, and fled upon the approach of prohibition officers. From these facts the conclusion is irresistible that the operations carried on were not only a violation of the prohibition law, but also with the intent of avoiding the payment of revenue tax on the spirits there distilled."

Certainly intent to defraud is to be drawn from the surrounding facts and circumstances, and in this case that shows an illicit still complete, a large quantity of

raw materials and supplies, and a large quantity of the manufactured product, housed by a building camaflouged with the character of a barn. In view of these facts, and this last expression by the Ninth Circuit Court, this specification appears to be wholly unfounded.

VI. THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK BECAUSE THE EVIDENCE SHOWED THAT ONLY A PART OF THE TRUCK WAS WITHIN THE ENCLOSURE.

Funk and Wagnalls New Standard Dictionary defines *within* to be synonymous with *inside.* But the courts broadly have often passed upon the meaning of the word in its various uses to much better advantage for the case at bar. For instance, in the law of fire insurance (not a good analogy, because of the civil contractual relation) no such technical use of the term "within any yard" urged by claimant, is anywhere to be found. See *Cooley's Brief on Insurance,* Vol. 6, p. 4925, et seq.

In *White v. County Court,* 76 W. Va., 727; 86 S. E. 765, where "within the county" as used in the Code granted to County Courts power to pay for making improvements and keeping in order "the whole or any part of any county road within the county" was held to include roads which were *partly* within.

In *Rolls v. Parish,* 105 Tex. 253; 149 S. W. 810, 812, it is held that a county seat is "within five miles" of the geographical center of the county, where any part of the county seat would be included within a circumference described around such center with a five mile

radius, although the whole of the county seat *was not within such circumference.*

Pacific Finance Corporation v. United States (9th) (supra) is, however, the leading case upon this question, and decisive. The last paragraph of that opinion passes upon the right of forfeiture under this section a truck which has been upon but had left the premises to avoid seizure. In this case the truck was "within the yard"—at least in part, and entered no further because the driver stopped to become a fugitive for the crime which he was committing through the assistance of the truck.

CONCLUSION

In view of the foregoing considerations it is submitted that neither of the specifications on appeal has substantial foundation.

Respectfully submitted,

Geo. J. Hatfield,
United States Attorney,

Albert E. Sheets,
Asst. United States Attorney,

Attorneys for Appellee.

No. 6125

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. I. T. CORPORATION, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANT'S PETITION FOR REHEARING.

HINDSDALE, OTIS & JOHNSON,
Attorneys for Appellant and Petitioner.

ROBERT W. JENNINGS,
Of Counsel.

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CLERK

Parker Printing Company, 545 Sansome Street, San Francisco

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UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANT'S PETITION FOR REHEARING.

To the Judges of the above entitled Court:

Appellant respectfully petitions for a rehearing of the appeal in this cause and to that end submits the following:

I.

INTENT TO DEFRAUD THE REVENUE.

The opinion states that:

"Appellant claims that inasmuch as the liquor was being manufactured with the intent of vio-

> lating the National Prohibition Act it could not be said to have been *the intent* of the manufacturers to violate the revenue law. This point is disposed of by the decision of the Supreme Court in U. S. v. One Ford Coupe, 272 U. S. 321." (Printed Opinion, p. 1.) (Italics ours.)

With all deference, we beg leave to urge (A) that such was not appellant's contention as made, and (B) that the case of *U. S. v. One Ford Coupe* (supra) does not dispose of appellant's contention as made, viz.:

A.

Appellant's contention was not that the fact that the liquor was being manufactured with the intent of violating the National Prohibition Act, *precluded* the *possibility of proof* that said manufacture was also with the intent of defrauding the revenue: on the contrary the contention was that the existence of an intent to violate the National Prohibition Act was *not ipso facto evidence* of an intent to defraud the revenue; and that as there was in the case at bar *no proof of intent to defraud the revenue* the government's case failed because of no proof of the specific intent required by the statute—proof of intent to violate the National Prohibition Act being *no proof* of intent to defraud the revenue. Appellant cited many cases so holding—cases which appellant contends are strictly in point. (See list of cases and extended quotations therefrom—Appellant's Brief, pp. 25 to 32 incl.)

B.

The *Ford Coupe case* (supra) so far from disposing of the question of proof of intent does not touch thereon except to say that it is possible the culprit may have both intents—and that

> "*If intent to defraud* the United States *is established by any competent* evidence" etc. (272 U. S. 321; 71 L. Ed. 285—1st col.)

The case does not anywhere hold that *the intent to defraud the revenue* is shown by proof of intent to violate the National Prohibition Act; and speaking of this decision it has been said that

> "The case arose on a motion to quash the libel. No evidence was taken and the question what constituted sufficient proof of intent to defraud the U. S. of such tax was not considered." (*U. S. v. One Dodge Coupe,* 34 Fed. (2d) 943—Appellant's Brief, p. 26.)

and

> "It does not seem to me that anything was decided except that Judge Grubb, the District Judge, should not in that case have dismissed the libel on motion, but should have heard it on its merits." (*U. S. v. One Chevrolet,* 21 Fed. (2d) 477—affirmed in *U. S. v. Gen. Motors,* 25 Fed. (2) 238—Appellant's Brief, pp. 28, 29.)

To appellant's contention then of *"no proof of intent to defraud the revenue",* it is obviously no answer to say that "There might have been such intent—*proof or no proof".*

WHEREFORE petitioner prays for a rehearing and that if this petition is denied this court will make its order staying the mandate herein for a period of 30 days in order to enable petitioner to apply to the Supreme Court for a Writ of Certiorari.

Respectfully submitted,

HINDSDALE, OTIS & JOHNSON,
Attorneys for Appellant and Petitioner.

ROBERT W. JENNINGS,
Of Counsel.

CERTIFICATE.

I hereby certify that the foregoing Petition for Rehearing is made in good faith and not for the purpose of delay, and that in my opinion it is well founded in point of law.

ROBERT W. JENNINGS,
One of Counsel for Petitioner.